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12
13 **IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA**

14
15 Deborah Schick, individually and on behalf
16 of a class of all persons and entities similarly
17 situated,

Case No.

18 Plaintiff,

CLASS ACTION COMPLAINT

19 vs.

20 Resolute Bank and John Doe Corporation
21 d/b/a Reverse Mortgage Savings Center,

22 Defendants.

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Preliminary Statement

1. “Month after month, unwanted robocalls and texts, both telemarketing and informational, top the list of consumer complaints received by” the Federal Communications Commission (“FCC”).¹

2. Plaintiff Deborah Schick brings this action under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

3. In violation of the TCPA, Defendant Resolute Bank (“Resolute”) hired the co-defendant, John Doe Corporation d/b/a Reverse Mortgage Savings Center (“John Doe”), which made automated telemarketing calls to a cellular telephone number of Ms. Schick for the purposes of advertising Resolute goods and services using an automated dialing system, which is prohibited by the TCPA.

4. John Doe made these calls because of an agreement with Resolute, which hired John Doe to generate business through telemarketing, and maintained interim control over their actions.

5. The Plaintiff never consented to receive the calls, which were placed to her for telemarketing purposes. Because telemarketing campaigns generally place calls to thousands or even millions of potential customers *en masse*, the Plaintiff brings this action on behalf of a proposed nationwide class of other persons who received illegal telemarketing calls from or on behalf of the Defendants.

¹ *Omnibus TCPA Order*, GC Docket 02-278, FCC 15-72, 2015 WL 4387780, ¶1 (July 10, 2015).

6. A class action is the best means of obtaining redress for the Defendants' wide scale illegal telemarketing and is consistent both with the private right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of the Federal Rules of Civil Procedure.

Parties

7. Plaintiff Schick is a resident of Arizona in this District.

8. Defendant Resolute Bank is an FDIC-insured bank founded in 2006 and currently headquartered at 3425 Briarfield Blvd Ste 100, Maumee, OH 4353. It regularly conducts business in this District, as it attempted to do with the Plaintiff.

9. Defendant John Doe Corporation d/b/a Reverse Mortgage Savings Center is an unidentified entity hired by Resolute Bank to generate business. John Doe Corporation does business in this District, including through the making of telemarketing calls, as it did with the Plaintiff.

Jurisdiction & Venue

10. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because the Plaintiff's claims arise under federal law.

11. Venue is proper under 28 U.S.C. § 1391(b)(2) because the calls that were initiated to the Plaintiff that are the subject of the litigation were made to a cellular telephone number in this District. As such, a substantial part of the events giving rise to the claims occurred in this District. Furthermore, the Plaintiff was in this District when she received the calls.

1
2 **TCPA Background**
3

4 12. In 1991, Congress enacted the TCPA to regulate the explosive growth of
5 the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted
6 telemarketing . . . can be an intrusive invasion of privacy.” Telephone Consumer
7 Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

8 13. The TCPA makes it unlawful “to make any call (other than a call made for
9 emergency purposes or made with the prior express consent of the called party) using an
10 automatic telephone dialing system or an artificial or prerecorded voice . . . to any
11 telephone number assigned to a . . . cellular telephone service.” *See* 47 U.S.C. §
12 227(b)(1)(A)(iii). The TCPA provides a private cause of action to persons who receive
13 calls in violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

14 14. According to findings by the Federal Communication Commission
15 (“FCC”), the agency Congress vested with authority to issue regulations implementing
16 the TCPA, such calls are prohibited because, as Congress found, automated or
17 prerecorded telephone calls are a greater nuisance and invasion of privacy than live
18 solicitation calls, and such calls can be costly and inconvenient.

19 15. The FCC also recognized that “wireless customers are charged for
20 incoming calls whether they pay in advance or after the minutes are used.” *In re Rules*
21 *and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-
22 278, Report and Order, 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003).

1 16. In 2013, the FCC required prior express written consent for all autodialed
2 or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.
3 Specifically, it ordered that:
4

5 [A] consumer’s written consent to receive telemarketing robocalls must be
6 signed and be sufficient to show that the consumer: (1) received “clear and
7 conspicuous disclosure” of the consequences of providing the requested
8 consent, i.e., that the consumer will receive future calls that deliver
9 prerecorded messages by or on behalf of a specific seller; and (2) having
10 received this information, agrees unambiguously to receive such calls at a
11 telephone number the consumer designates.[] In addition, the written
agreement must be obtained “without requiring, directly or indirectly, that
the agreement be executed as a condition of purchasing any good or
service.[]”

12 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,*
13 27 F.C.C. Rcd. 1830, 1844 (2012) (footnotes omitted).

14 17. “Robocalls and telemarketing calls are currently the number one source of
15 consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016),
16 <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC
17 chairman).

18 18. “The FTC receives more complaints about unwanted calls than all other
19 complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer
20 Protection, *In re Rules and Regulations Implementing the Telephone Consumer*
21 *Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2
22 (2016), https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf.

19. In fiscal year 2017, the FTC received 4,501,967 complaints about robocalls, compared with 3,401,614 in 2016. Federal Trade Commission, *FTC Releases FY 2017 National Do Not Call Registry Data Book and DNC Mini Site* (Dec. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc>.

20. *The New York Times* recently reported on the skyrocketing number of robocall complaints and widespread outrage about illegal telemarketing. Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018), <https://www.nytimes.com/2018/05/06/your-money/robocalls-riseillegal.html>; see also Katherine Bindley, *Why Are There So Many Robocalls? Here's What You Can Do About Them*, Wall St. J. (July 4, 2018), <https://www.wsj.com/articles/why-there-are-so-manyrobocalls-heres-what-you-can-do-about-them-1530610203>.

21. Even more recently, a technology provider combating robocalls warned that nearly half of all calls to cell phones next year will be fraudulent. Press Release, First Orion, Nearly 50% of U.S. Mobile Traffic Will Be Scam Calls by 2019 (Sept. 12, 2018), <https://www.prnewswire.com/news-releases/nearly-50-of-us-mobile-traffic-will-be-scam-calls-by-2019-300711028.html>

Factual Allegations

22. Resolute provides reverse mortgage business, personal and mortgage solutions to its customers.

23. To generate business through sales, Resolute relies on telemarketing.

1 24. However, Resolute's contact with the potential new customers is limited,
2 and the telemarketing is conducted by third parties, such as John Doe Corporation.
3

4 25. One of Resolute's strategies for telemarketing involves the use of an
5 automatic telephone dialing system ("ATDS") to solicit business by third parties.
6

7 26. Resolute engages the use of this equipment and the technology because it
8 allows for thousands of automated calls to be placed at one time, but its telemarketing
9 representatives, who are paid by the hour, only talk to individuals who pick up the
10 telephone.

11 27. Through this method, Resolute shifts the burden of wasted time to the
12 consumers it calls with unsolicited messages.
13

14 28. On December 5, 2018 the Plaintiff received an automated call from John
15 Doe on her cellular telephone line, (925) 735-XXXX.
16

17 29. The Plaintiff's number was called even though it is on the National Do Not
18 Call Registry.
19

20 30. The call was made with an ATDS because there was a distinct "click and
21 pause" at the outset of the call.
22

23 31. Furthermore, the call was sent from area codes local to the Plaintiff's
24 cellular telephone number. Since it takes a computer-based dialer to manipulate a Caller
25 ID, that is further indication that the calls were made by an ATDS.
26

27 32. Shortly after the call was connected to a live individual, the Plaintiff was
28 able to identify that Resolute's services were being offered.
29

33. In fact, Resolute Bank made repeated follow up calls to Ms. Schick in January of 2019.

34. The Plaintiff also received an e-mail from Resolute entitled “reverse mortgage information from Peter”.

35. The e-mail address that sent the message was “peter.tougigny@resolutefsb.com”.

36. The calls were not necessitated by an emergency.

37. Plaintiff's privacy has been violated by the above-described telemarketing robocalls from, or on behalf of, Defendants. The calls were an annoying, harassing nuisance.

38. Plaintiff and all members of the Class, defined below, have been harmed by the acts of Defendants because their privacy has been violated, they were annoyed and harassed, and, in some instances, they were charged for incoming calls. The calls occupied their cellular telephone lines, rendering them unavailable for legitimate communication.

Resolute's Liability and its Arrangement with John Doe

39. For more than twenty years, the FCC has explained that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13) (1995).

1 40. On May 9, 2013, the FCC released a Declaratory Ruling holding that a
 2 corporation or other entity that contracts out its telephone marketing “may be held
 3 vicariously liable under federal common law principles of agency for violations of either
 4 section 227(b) or section 227(c) that are committed by third-party telemarketers.”²
 5

6 41. In that ruling, the FCC instructed that sellers such as Resolute may not
 7 avoid liability by outsourcing telemarketing:
 8

9 [A]llowing the seller to avoid potential liability by outsourcing its
 10 telemarketing activities to unsupervised third parties would leave
 11 consumers in many cases without an effective remedy for telemarketing
 12 intrusions. This would particularly be so if the telemarketers were judgment
 13 proof, unidentifiable, or located outside the United States, as is often the
 14 case. Even where third-party telemarketers are identifiable, solvent, and
 15 amenable to judgment limiting liability to the telemarketer that physically
 16 places the call would make enforcement in many cases substantially more
 17 expensive and less efficient, since consumers (or law enforcement
 18 agencies) would be required to sue each marketer separately in order to
 19 obtain effective relief. As the FTC noted, because “[s]ellers may have
 20 thousands of ‘independent’ marketers, suing one or a few of them is
 21 unlikely to make a substantive difference for consumer privacy.”
 22

23 May 2013 FCC Ruling, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).
 24

25 42. The May 2013 FCC Ruling held that, even absent evidence of a formal
 26 contractual relationship between the seller and the telemarketer, a seller is liable for
 27 telemarketing calls if the telemarketer “has apparent (if not actual) authority” to make the
 28 calls. 28 FCC Rcd at 6586 (¶ 34).

29 43. The May 2013 FCC Ruling further clarifies the circumstances under which
 30 a telemarketer has apparent authority:
 31

2 ² *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

[A]pparent authority may be supported by evidence that the seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control, including: access to detailed information regarding the nature and pricing of the seller's products and services or to the seller's customer information. The ability by the outside sales entity to enter consumer information into the seller's sales or customer systems, as well as the authority to use the seller's trade name, trademark and service mark may also be relevant. It may also be persuasive that the seller approved, wrote or reviewed the outside entity's telemarketing scripts. Finally, a seller would be responsible under the TCPA for the unauthorized conduct of a third-party telemarketer that is otherwise authorized to market on the seller's behalf if the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.

FCC Rcd at 6592 (¶ 46).

44. By engaging John Doe to make calls on behalf of its agents to generate new business, Resolute "manifest[ed] assent to another person . . . that the agent shall act on the principal's behalf and subject to the principal's control" as described in the Restatement (Third) of Agency.

45. Moreover, Resolute maintained interim control over John Doe's actions.

46. For example, Resolute had absolute control over whether, and under what circumstances, it would accept a customer.

47. Furthermore, Resolute had day-to-day control over John Doe's actions, including the ability to prohibit it from using an ATDS to contact potential customers of Resolute. Resolute failed to make such an instruction to John Doe, and as a result, is liable for John Doe's conduct.

48. Resolute also gave interim instructions to John Doe by providing the volume of calling and leads it would purchase.

49. John Doe transferred customer information directly to Resolute. Thus, the company that Resolute hired has the “ability . . . to enter consumer information into the seller’s sales or customer systems,” as discussed in the May 2013 FCC Ruling. As such, the company that Resolute hired is an apparent agent of Resolute.

50. Resolute had also previously been sued for the actions of third party telemarketers it hired, and as such was on notice that third parties, such as John Doe, were violating the TCPA on Resolute's behalf.

51. Resolute has also previously received complaints and has been named in lawsuits related to telemarketing activities.

52. Finally, the May 2013 FCC Ruling states that called parties may obtain “evidence of these kinds of relationships . . . through discovery, if they are not independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of circumstances pointing to apparent authority on behalf of the telemarketer “should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller’s authorized agent.” *Id.* at 6593 (¶ 46).

Class Action Allegations

53. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of a class of all other persons or entities similarly situated throughout the United States.

1 54. The class of persons Plaintiff proposes to represent are tentatively defined
2 as:
3

4 All persons within the United States to whom: (a) Resolute and/or a third
5 party acting on their behalf, made one or more non-emergency telephone
6 calls; (b) to their cellular telephone number; (c) using an automatic
7 telephone dialing system or an artificial or prerecorded voice; and (d) at any
time in the period that begins four years before the date of the filing of this
Complaint to trial.

8
9 Excluded from the class are the Defendants, and any entities in which the Defendants
10 have a controlling interest, the Defendants' agents and employees, any judge to whom
11 this action is assigned and any member of such judge's staff and immediate family.
12

13 55. The class as defined above is identifiable through phone records and phone
14 number databases.

15 56. The potential class members number at least in the thousands, since
16 automated telemarketing campaigns make calls to hundreds or thousands of individuals a
17 day. Individual joinder of these persons is impracticable.
18

19 57. Plaintiff is a member of the proposed class.
20

21 58. There are questions of law and fact common to Plaintiff and to the
22 proposed class, including but not limited to the following:

- 23 a. Whether Defendants violated the TCPA by using automated
24 telemarketing to call cellular telephones;
25
26 b. Whether Defendants placed calls using an automatic telephone
27 dialing system;
28
29 c. Whether Resolute is vicariously liable for the conduct of John Doe;

1 d. Whether Defendants placed calls without obtaining the recipients'
2 prior consent for the call;

3 e. Whether the Plaintiff and the class members are entitled to statutory
4 damages because of Defendants' actions.

5 59. Plaintiff's claims are typical of the claims of class members. Plaintiff's
6 claims, like the claims of the Class, arise out of the same common course of conduct by
7 the Defendants and are based on the same legal and remedial theories.

8 60. Plaintiff is an adequate representative of the class because her interests do
9 not conflict with the interests of the class, she will fairly and adequately protect the
10 interests of the class, and she is represented by counsel skilled and experienced in class
11 actions, including TCPA class actions.

12 61. Common questions of law and fact predominate over questions affecting
13 only individual class members. The only individual question concerns identification of
14 class members, which will be ascertainable from records maintained by Defendants
15 and/or their agents.

16 62. Management of these claims is likely to present significantly fewer
17 difficulties than are presented in many class claims because the calls at issue are all
18 automated. Class treatment is superior to multiple individual suits or piecemeal litigation
19 because it conserves judicial resources, promotes consistency and efficiency of
20 adjudication, provides a forum for small claimants, and deters illegal activities. There
21 will be no significant difficulty in the management of this case as a class action.
22
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63. The likelihood that individual members of the class will prosecute separate actions is remote due to the time and expense necessary to prosecute an individual case.

First Cause of Action

Violation of the TCPA, 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200(a)

64. Plaintiff incorporates the allegations from all previous paragraphs as if fully set forth herein.

65. The Defendants violated the TCPA by (a) initiating a telephone call using an automated dialing system or prerecorded voice to Plaintiff's telephone number assigned to a cellular telephone service, or (b) by the fact that others caused the initiation of those calls on its behalf. *See* 47 C.F.R. 64.1200(a)(1)(iii); 47 U.S.C. § 227(b)(1).

66. The Defendants' violations were negligent, willful, or knowing.

67. Plaintiff and members of the class are also entitled to and do seek an injunction prohibiting Defendants and/or their affiliates and agents from placing non-emergency calls to any cellular telephone number using an ATDS and/or artificial or prerecorded voice.

Prayer for Relief

For herself and all class members, Plaintiff requests the following relief:

1. That Defendants, their agents, and anyone acting on their behalf, be immediately restrained from altering, deleting, or destroying any documents or records that could be used to identify class members.

1 2. That the Court certify the proposed class under Rule 23 of the Federal
2 Rules of Civil Procedure.

3 3. That the Plaintiff and all class members be awarded statutory damages of
4 \$500 for each negligent violation of the TCPA, and \$1,500 for each knowing violation,
5 and all other relief that is just and equitable.

6 4. **The TCPA authorizes injunctive relief to prevent the Defendants from**
7 **using automatic telephone dialing equipment.** The Plaintiff respectfully petitions this
8 Court to order the Defendants, and their employees, agents and independent contractors,
9 to immediately cease engaging in unsolicited telemarketing in violation of the TCPA.
10
11
12

13
14 Plaintiff requests a jury trial as to all claims of the complaint so triable.
15
16

17 Dated: April 5, 2019

Respectfully Submitted,

18 */s/ Trinette G. Kent*
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